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In The

Supreme Court of the United States

October Term, 1982

No. _____

ICE CREAM INDUSTRY DRIVERS
AND ICE CREAM EMPLOYEES UNIONS PENSION
FUND ("THE ICE CREAM FUND"),

Petitioner,

v.

LUCIA NOVEMBRE And ANN DELUCA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

EUGENE S. FRIEDMAN
(Counsel of Record)
FRANKLIN K. MOSS
COHEN, WEISS and SIMON
330 West 42nd Street
New York, N.Y. 10036
(212) 563-4100
Counsel for Petitioner

PRINTINGHOUSE PRESS—(212) 719-3120

QUESTION PRESENTED

Whether an oral representation by a union official, who is also one of ten trustees of a jointly administered Labor-Management Pension Fund, creates an estoppel compelling the Pension Fund to provide benefits that are forbidden by the Fund's written rules and regulations and federal law?

THE PARTIES

The Ice Cream Industry Drivers and Ice Cream Employees Unions Pension Fund (the "Ice Cream Fund") is the Petitioner, and was a defendant in the district court and an appellant in the Court of Appeals. The Respondents are Lucia Novembre and Ann DeLuca, who were plaintiffs in the district court and appellees in the Court of Appeals.

In addition to Petitioner, other defendants in the district court were Local 584; Local 680; the Local 584 Pension Trust Fund (the "Local 584 Pension Fund"); the Local 584 Welfare Trust Fund; the Ice Cream Welfare Fund; and three individual union officers: John Kelly, Larry McGinley and Tony Iorio. The district court found liability against Local 584, Local 680, the Local 584 Pension Fund and Petitioner. Local 680 and Petitioner appealed the district court judgment to the Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI
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THE OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey dated February 17, 1981, is reprinted in Appendix A of this Petition. The district court's opinion on rehearing dated May 7, 1981, is reprinted in Appendix

B of this Petition. The Judgment-Order of the United States Court of Appeals for the Third Circuit affirming the district court judgment is reprinted in Appendix C of this Petition. The opinions below are unreported.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Third Circuit was entered on July 29, 1982 (Appendix C). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of 29 U.S.C. §§ 186, 1102 and 1104 are reprinted in Appendix D of this petition.

STATEMENT OF THE CASE

Petitioner, the Ice Cream Industry

Drivers and Ice Cream Employees Unions Pension Fund (the "Ice Cream Fund") is a multiemployer, joint union-management pension fund established pursuant to Section 302 of the Labor Management Relations Act of 1947 ("Taft-Hartley Act"), 29 U.S.C. §186, and the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001 et. seq. Pursuant to the Taft-Hartley Act, union and employer-designated trustees have an equal say in the operation of the Fund. The union trustees are divided among representatives of two unions -- Local 757 and Local 680.

Respondents Novembre and DeLuca were employed prior to 1966 by Sealtest, a contributing employer to the Ice Cream Fund, and were represented for collective bargaining purposes by Local 680. In 1966, as a result of a corporate merger, they shifted their employment to Consumers Dairy, and

became represented by another union, Local 607, and later, as a result of a union merger, by Local 584. Contributions on their behalf were made by Consumers Dairy to the Local 584 Pension Fund.

In 1975, respondents applied for pensions from the Ice Cream Fund. Under the Ice Cream Fund's rules and regulations, the minimum number of years of credited service required for a regular pension was 30 years with an Ice Cream Fund employer. An early retirement pension was available at age 55 to those with 15 years of credited service. Neither respondent satisfied the requirements for either a regular or an early retirement pension. While they sought to be credited for purposes of calculating Ice Cream Fund service with the years during which contributions were made to the Local 584 Fund, the Ice Cream Fund lacked a reciprocal agreement with the Local 584 Fund.

Consequently, in accordance with the Ice Cream Fund's written rules and regulations, the Fund's trustees denied Respondents' pension applications.

Respondents then brought suit in the United States District Court for the District of New Jersey. While conceding their ineligibility under the Ice Cream Fund rules and regulations, Respondents contended that as a result of statements made at a dinner-meeting called by Local 680 in 1965, they were entitled to Ice Cream Fund pensions based upon the doctrine of estoppel.

At the dinner-meeting, Respondents claimed, and the district court so found, Lawrence McGinley, an officer of Local 680 who was also one of ten Trustees of the Ice Cream Fund, had told them they would be able to carry over their Ice Cream Fund service credits to their new

employer's pension fund.* Novembre and DeLuca contended that they had relied on these oral representations by remaining in the employ of Sealtest rather than seeking other work.

By an opinion dated February 17, 1981, the district court held the unions, Locals 584 and 680, liable for the money that Novembre and DeLuca would have received had there been a reciprocal agreement between the two Funds. However, relying on the then-unanimous rule in the Circuits,**

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*Similar assurances were alleged to have been made at the dinner-meeting by Tony Iorio, a Local 680 business agent and by Sid Bornstein, an officer of Local 607.

**The district court relied on Aitken v. IP & GCU-Employer Retirement Fund, 604 F. 2d 1261 (9th Cir. 1979); Thurber v. Western Conference of Teamsters Pension Plan, 542 F.2d 1106 (9th Cir. 1976); Moglia v. Geoghegan, 403 F.2d 110 (2d Cir. 1968), cert. denied, 394 U.S. 919 (1969); and Phillips v. Kennedy, 542 F.2d 52 (8th Cir. 1976).

the district court refused to permit estoppel against the Funds.*

On May 7, 1981, following the Third Circuit's decision in Rosen v. Hotel & Restaurant Employees Union, Local 274, 637 F.2d 592 (3rd Cir.), cert. denied, 102 S.Ct. 398 (1981), the district court on rehearing reversed itself, and rendered judgment against the Funds for the full amount of pension benefits sought. The court also awarded attorneys' fees against Local 584 and the Local 584 Fund, but found that since the Ice Cream Fund and Local 680 had acted in good faith, they would not be liable for attorneys' fees.

The Ice Cream Fund then appealed to the United States Court of Appeals for the Third Circuit in No. 81-2362, and Local 680 appealed in No. 81-2363. The two

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*The district court did order the Funds to pay the respondents the employer contributions made on their behalf.

appeals were consolidated, and on July 29, 1982, the Third Circuit affirmed the district court judgment.

DISTRICT COURT JURISDICTION

Jurisdiction in the district court was proper under 29 U.S.C. §§185(a) and 1132(f).

REASONS FOR GRANTING THE WRIT

There are about two thousand multiemployer pension funds in the United States with aproximately eight million participants.* The question presented in this petition is of vital concern to all contributing employers, unions, trustees, and participating employees, as well as to those federal agencies responsible for ensuring that

*See Pension Benefit Guaranty Corporation, Multiemployer Study Required by P.L. 95-214, reprinted in Hearings on the Multiemployer Pension Plan Amendments Act of 1979, at 1149, 1155.

pensions be provided employees in conformity with the law.

A. Four of the Five Circuits that have Decided the Issue Have Refused to Estop a Pension Fund into Providing Otherwise Unlawful Benefits

Section 302(c)(5)(B) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §186(c)(5)(B), makes pension fund contributions unlawful unless "the detailed basis on which such payments are to be made is specified in a written agreement with the employer...." See NLRB v. Amax Coal Co., 453 U.S. 322, 328 (1981); Moglia v. Geoghegan, 403 F.2d 110 (2d Cir. 1968), cert. denied, 394 U.S. 919 (1969).

The Employee Retirement Income Security Act (ERISA) also contains a

written agreement requirement. Section 402(a)(1) of ERISA mandates that: "Every employee benefit plan shall be established and maintained pursuant to a written instrument." 29 U.S.C. §1102(a)(1) (emphasis added). Section 402(b)(4) provides further that the plan shall "specify the basis on which payments are made to and from the plan." 29 U.S.C. §1102(b)(4) (emphasis added). Similarly, §404(a)(1)(D) imposes on plan fiduciaries the obligation to discharge their duties "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter." 29 U.S.C. §1104(a)(1)(D) (emphasis added).

In addition to the written document requirements of the LMRA and ERISA, another fundamental aspect of the statutory scheme is the requirement that union and employer representatives must have equal say in all pension decisions. Labor Management Relations Act §302(c)(5)(B), 29 U.S.C. §186(c)(5)(B). Under §302(c)(5)(B), union representatives may not lawfully bind a fund without the concurrence of their employer conterparts. See NLRB v. Amax Coal Co., 453 U.S. at 328-29.

In order to effectuate the congressional mandates, every Circuit to address the issue, with the exception of the Third Circuit, has refused to apply ordinary rules of common law estoppel against a pension fund, where to do so would contravene the statutory requirements: (1) that employer and employee representatives have an equal say in the administration of a Taft-Hartley pension fund; and (2) that

benefits be provided only in accordance with the written documents and instruments governing the fund. See Aitken v. IP & GCU-Employer Retirement Fund, 604 F.2d 1261, 1266-67 (9th Cir. 1980); Reiherzer v. Shannon, 581 F.2d 1266, 1267 n.1 (7th Cir. 1978); Phillips v. Kennedy, 542 F.2d 52, 55 n.8 (8th Cir. 1976); Thurber v. Western Conference of Teamsters Pension Plan, 542 F.2d 1106, 1108 (9th Cir. 1976); Moglia v. Geoghegan, 403 F.2d 110, 116 (2d Cir. 1968), cert. denied, 394 U.S. 919 (1969). See also Van Gunten v. Central States, Southeast & Southwest Areas Pension Fund, 672 F.2d 586, 589 (6th Cir. 1982); San Pedro Fishermen's Welfare Fund Local 33 v. DiBernardo, 664 F.2d 1344, 1345 (9th Cir. 1982); Haeberle v. Board of Trustees of Buffalo Carpenters Health-Care, Pension & Supplemental Funds, 624 F.2d 1132, 1139 (2d Cir. 1980); Michota v. Anheuser-Busch, Inc., 526 F.Supp. 299, 317 (D.N.J. 1980);

Feathers v. UMW Health & Retirement Funds, 99 LRRM 2287, 2290 (D.D.C. 1978); Chamberlin v. Bakery & Confectionery Union, 99 LRRM 3176, 3180 (N.D. Cal. 1977); Hodgins v. Central States Southeast & Southwest Areas Pension Fund, 94 LRRM 2507, 2508 (E.D. Mich. 1976); Trucking Employees of North Jersey Welfare Fund v. Vrablick, 177 N.J. Super. 142, 425 A.2d 1068 (1980).

The courts have given a multitude of reasons for the refusal to apply estoppel. Some rely on the rule that "the doctrine of estoppel may not be invoked to compel an illegal act." E.g., Thurber, 542 F.2d at 1109. Some rely on the congressional intent to preclude eligibility other than in accordance with the written plan documents. E.g. Reiherzer, 581 F.2d

at 1267 n.1.* Still others refer to the danger of collusion or other illicit use of Fund assets if representations by one Fund trustee are permitted to bind the Fund. E.g., Moglia v. Geoghegan, 403 F.2d at 116:

> The reason for the rigid structure of Section 302 is to insure that employer contributions are only for a proper purpose and to insure that the benefits from the established fund reach only the proper parties. (citation omitted). Any erosion of the strict requirements of this section could provide an unintended loophole for the unscrupulous, and could result in a diversion of funds away from the proper parties as had occurred before Section 302 was enacted. (citations omitted).

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*"To allow the conduct or statements of persons entrusted with administering an employer-funded union pension fund to alter pension eligibility could seriously undermine the 'written agreement' requirement of Section 302(c)(5)(B)." Reiherzer, 581 F.2d at 1267 n.1.

> Our construction of Section 302 may work a hardship in the instant case...but we consider the construction of the statute that we have adopted is the only acceptable one in light of the congressional history and intent.

Finally, underlying most of the cases is a concern that to permit estoppel might jeopardize the "actuarial soundness" of the Fund by imposing liabilities unforeseen by the Fund's actuary. E.g., Phillips v. Kennedy, 542 F.2d at 55 n.8:

> "The actuarial soundness of pension funds is, absent extraordinary circumstances, too important to permit trustees to obligate the fund to pay pensions to persons not entitled to them under the express terms of the pension plan."

In Rosen v. Hotel & Restaurant Employees Union, Local 274, 637 F.2d 592 (3rd Cir.), cert. denied, 102 S.Ct. 398 (1981), the Third Circuit, referring to the above-quoted language in Phillips v. Kennedy, purported to carve out an exception to the general rule where there were

"more than mere assurances by the Trustees" and "'extraordinary circustances.'" Rosen, 637 F.2d at 598. Among the circumstances the Rosen court evidently felt were extraordinary were that the representations had been made by the Secretary of the Fund, and not just a single Trustee; that in addition to remaining in his job, Rosen, in reliance on misrepresentations had actually paid money out of his pocket to the Trustees; and that the Fund had confirmed in writing the misrepresentations relied upon.

The instant case goes beyond Rosen and permits the exception to swallow the rule. Here, the courts below found no extraordinary circumstances, but nevertheless ordered the Ice Cream Fund to pay pensions contrary to the written fund documents, based solely on oral statements found to have been made at a dinner-meeting

almost 17 years ago.

There was no evidence here that any of the Trustees representing Local 757 or the employers even knew about the dinner-meeting, let alone the promises found to have been made by the Local 680 representative. Nor was there any written confirmation of the misrepresentations. In such circumstances, the potential for fraud or collusion are immense.

A union trustee, anxious to obtain for his members benefits rejected at the bargaining table and by the employer trustees, could ensure those benefits merely by falsely proclaiming their existence. Similarly, an employer trustee, eager to obtain ratification by his employees of a meager contract offer, could assure them that additional pension benefits would be provided, notwithstanding the refusal of

the majority of Trustees to approve of such benefits.

In these cases, as well as other similar cases, the ability of the Fund to continue to provide benefits on a sound actuarial basis to those who are eligible under the rules of the Fund would be jeopardized.

Moreover, even if complete good faith is assumed, the potential for negligent misrepresentations is immense. Pension Fund documents are invariably complex, and ERISA is even more so. Fund trustees are generally laymen, unaware of the subtleties of the law. Under the Third Circuit rule, one misstatement by a single union official, however innocently made,* would result in the imposition of an unfounded liablity on the trustees.

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*The district court acknowledged that union trustee Larry McGinley's 1965 dinner-meeting statements had been made in good faith.

B. The Decision of the Court Below is Inconsistent with the Principles Underlying this Court's Decision in Schweiker v. Hansen.

The refusal of courts to apply estoppel against pension funds, absent extraordinary circumstances, reflects the necessity of balancing the interests of the individual against the interests of other beneficiaries, employer trustees and employers, governments agencies and the public at large. In the analogous circumstance of attempts to apply estoppel against the government, the Supreme Court has, since the Rosen decision, emphasized that oral representations standing alone cannot estop the government from enforcing its written rules. Schweiker v. Hansen, 450 U.S. 785 (1981).

In Schweiker, a Social Security official had erroneously and wrongfully informed the plaintiff that she was ineligible for benefits. As a result, she failed to file a written Social Security application in a

timely fashion as required by regulations. The Supreme Court refused to estop the government from relying on its requirement that applications be made in writing in a timely fashion. While the Court did not decide whether a government official's actions could ever estop the government from insisting upon compliance with valid regulations, the Court did hold that under the circumstances, the giving of misinformation orally falls far short of conduct that could possibly justify estoppel.

The policy justifications limiting estoppel against the government are virtually identical to those limiting estoppel against a pension fund.* In both cases,

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*The relative burden on the U.S. Treasury of providing benefits to Hansen was certainly far less than the burden imposed here on the Ice cream Fund. Moreover, since Hansen had satisfied all the substantive requirements for Social Security benefits, see Schweiker, 450 U.S. at 787, the actuarial consequences of estoppel were minimal. Here, of course, plaintiffs have failed to meet the substantive requirements for Ice Cream Fund pension eligibility.

estoppel would mandate performance that would otherwise be unlawful. In both, the interest of innocent third parties would be jeopardized. In both, the requirement that commitments be authorized and made in writing assures accountability and prevents collusion, favoritism, fraud, and false testimony about ancient events.

The entire statutory scheme of Taft-Hartley and of ERISA is premised on the reliability of written fund documents. Funds must satisfy elaborate disclosure provisions requiring that participants be advised of the terms of the plan. 29 U.S.C. §§1021, 1022, 1024. In addition, an annual report must be published, including actuarial evaluations of the written plan obligations. 29 U.S.C. §1023. Individual benefit statements must also be furnished to participants and filed with the Government. 29 U.S.C. §§1024, 1025;

IRC §6057. If benefits may be paid on any basis other than that provided in the written plan documents, participants, employers and unions will be misled by their reliance on the written plan documents.

Moreover, government agencies must rely extensively on the written plan documents. The Department of Labor, the Internal Revenue Service and the Pension Benefit Guaranty Corporation ("PBGC") all have oversight responsibility over pension fund benefits and revenues. If oral statements may estop a fund into providing benefits prohibited by the written fund documents filed with these agencies, the government will be unable to meaningfully evaluate the financial and actuarial status of a fund. Moreover, the PBGC is the ultimate insurer of certain minimum plan benefits. See, 29 U.S.C. §§1302, 1322, 1322a. If a

fund is rendered insolvent because of payments not foreseen in the written fund documents, the PBGC may be forced to assume certain fund obligations.

In Schweiker v. Hansen, the Court recognized the interest in observing the conditions defined by Congress for charging the public treasury. 450 U.S. at 788. There is an analogous interest in observing the conditions established by a fund's trustees for paying pension benefits. Accordingly, certiorari should be granted because the decisions of the courts below are inconsistent with the principles articulated in Schweiker v. Hansen.

CONCLUSION

It is respectfully requested that certiorari should be granted: (1) to resolve the conflict in the Circuits, and (2) to apply the principles articulated in Schweiker v. Hansen to pension funds established pursuant to the Labor Management Relations Act and ERISA.

Respectfully submitted,

Eugene S. Friedman
(Counsel of Record)
Franklin K. Moss
COHEN, WEISS and SIMON
330 West 42nd Street
New York, New York 10036
Tel. (212) 563-4100

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